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In the Supreme Court of the United States

OCTOBER TERM, 1953

767

No. —

FEDERAL TRADE COMMISSION, PETITIONER

v.

RHODES PHARMACAL COMPANY, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit entered in the above-entitled cause on November 3, 1953.

OPINION BELOW

The opinion of the Court of Appeals (R. 973) is reported at 208 F. 2d 382.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1953 (R. 980), and a timely petition for rehearing (R. 981) was denied on

January 5, 1954 (R. 989).[1] The time for filing a petition for a writ of certiorari was extended by Mr. Justice Jackson on March 23, 1954, to May 18, 1954 (R. 999). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

The Federal Trade Commission, after extensive hearings, found that respondents had made a number of misrepresentations in connection with the sale of the drug "Imdrin" as a treatment for rheumatism and arthritis, and entered a cease-and-desist order prohibiting such misrepresentations. The Court of Appeals held that the Commission's findings as to respondents' misrepresentations were supported by substantial evidence. The court further held, however, that the word "temporary," which the Commission used to characterize the relief from pain and discomfort afforded by the drug, rendered one provision of the order ambiguous. The court modified that provision by rewriting it in a way that had the effect of materially changing the scope of the Commission's order, and thereby permitting the respondents to continue making representations as to relief from pain and discomfort which the Commission had found to be false. The questions presented are:

1. Assuming *arguendo* that the word "temporary" makes the order ambiguous, whether the re-

[1] On February 17, 1954, the court entered a second judgment, captioned "Final Decree" (R. 996). Cf. *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206.

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viewing court's power to modify a Commission order authorizes the court to rewrite the order so as to substitute its judgment for that of the Commission as to the measure of relief necessary to correct the illegal practices.

2. Whether the word "temporary," which the Commission used in describing the relief given by the drug, rendered the order so ambiguous as to justify its modification.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> * * * * *
>
> (c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or

practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. * * * Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript, a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed * * *.

STATEMENT

In August 1949, the Federal Trade Commission issued a complaint (R. 2) charging that respondents had engaged in unfair and deceptive acts and practices by disseminating false and misleading advertisements in connection with the sale of the drug "Imdrin" as a treatment for rheumatism and arthritis. After extensive administrative proceedings unchallenged as to regularity, the Commission in October 1952 issued its findings and opinion holding that respondents had engaged in such practices, and entered a cease-and-desist order.

The pertinent findings of the Commission [2]—which the Court of Appeals held to be supported by substantial evidence (R. 979)—are as follows:

[2] The Commission adopted the findings of the examiner (R. 946).

Respondents' radio and newspaper advertisements have represented that the drug "Imdrin," when taken as directed, constitutes an adequate, effective, and reliable treatment for, and will cure, all forms of rheumatism and arthritis; that it constitutes such a treatment for the symptoms and manifestations of those diseases; and that it will afford complete permanent relief from the aches, pains, and discomforts thereof (Par. Four, R. 954).[3] There is no drug which is an adequate or effective treatment for any of the various forms of arthritis or rheumatism (Par. Seven, R. 956). Effective treatment for these diseases varies among individuals (Par. Six, R. 956), must be predicated upon individual diagnosis (*ibid.*), and may involve therapeutic measures, including diet, rest or change

[3] The Commission found that respondents' "[t]ypical" advertisements (R. 949) included the following: "No Faster Arthritis Pain Relief Known * * * Stops Swelling. Uncorks Joints * * * Longtime sufferers from rheumatism, arthritis, neuritis and gout may find Imdrin gives glorious relief amazingly fast * * *" (*ibid.*); "Imdrin reduced joint swelling and eased pain rapidly" (R. 951); "If you have suffered the tortures of rheumatic or arthritic pains, swelling and stiffness . . . listen! Imdrin may answer your problem of comfortable living. * * * Cases deemed almost hopeless . . . persons who suffered and waited and hoped for as long as twenty years were able to live happy comfortable lives once again" (*ibid.*); "Imdrin is a product scientifically designed to aid in the relief of nagging aches, pains, swelling, and stiffness accompanying arthritis and related illnesses * * *" (R. 952). Other advertisements in the record include: "Imdrin * * * not only stops pain, helps reduce swelling, but acts to uncork the joints" (R. 735). "Users of Imdrin report that they have resumed normal living. For them the aching joints and muscles are a thing of the past" (R. 736). "* * * Imdrin, the brand-new, safe and reliable way to cure pain that is being prescribed by many doctors to bring quick, blessed relief from arthritic pain, stiffness and swelling" (R. 735).

of occupation, physiotherapy, surgery, and medication (Par. Seven, R. 956). Delay of needed treatment may result in irreparable crippling (*ibid.*)

Imdrin will not constitute an adequate, effective, or reliable treatment or cure for any arthritic or rheumatic conditions; will have no significant effect upon severe aches, pains, and discomforts accompanying such conditions; will afford temporary and partial relief of only minor aches, pains, and discomforts; and, except for such temporary and partial relief, cannot be depended upon to have any effect whatever upon the symptoms accompanying any arthritic or rheumatic conditions (Par. Nine, R. 957-958).

In an accompanying opinion, the Commission stated that the greater weight of the expert medical testimony was that the only ingredients in Imdrin, when taken as directed, which have any significant beneficial effect are the salicylates (R. 962, 963-964); that such salicylates have no therapeutic value in the treatment of arthritic or rheumatic conditions, and have no beneficial effect upon the symptoms thereof other than to afford temporary and partial relief from less severe pains and fever (R. 962); that, according to the unanimous expert medical testimony, the salicylates contained in the prescribed daily dosage of Imdrin are insufficient to relieve the most severe arthritic and rheumatic pains, and, according to the greater weight of such testimony, are inadequate for complete relief from pains acompanying an average case (R. 963-964).

The Commission's cease-and-desist order contains six substantive subparagraphs. Paragraph 1 (c), the provision involved in this case, enjoins respondents from representing in any advertisement that Imdrin—

> . . . will afford any relief of severe aches, pains, and discomforts of neuritis, sciatica, gout, neuralgia, fibrositis, bursitis, or any other arthritic or rheumatic condition, or have any therapeutic effect upon any of the symptoms or manifestations of any such condition in excess of affording temporary and partial relief of minor aches, pains, or fever [R. 959].

The Court of Appeals, holding that the Commission's findings were supported by substantial evidence (R. 979), affirmed and enforced five paragraphs of the order,[4] but modified paragraph 1 (c) so that it would prohibit representing that Imdrin—

> . . . will afford any permanent relief of aches, pains, and discomforts of neuritis, sciatica, gout, neuralgia, fibrositis, bursitis, or any other arthritic or rheumatic condition, or effect a cure of the symptoms or manifestations of any such condition [R. 981].

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[4] These paragraphs prohibit representing that Imdrin is an adequate, effective, or reliable treatment for, or will arrest the progress or correct the underlying causes of, any arthritic or rheumatic condition (Pars. 1(a), 1(b)); that it is a new, remarkable, or sensational discovery (Par. 1(d)); that it will enable severely afflicted persons to resume normal living habits or occupations (Par. 1(e)); or that it will have any therapeutic effect upon the enzyme systems (Par. 1(f)) (R. 959).

In making this modification, the court stated that Commission orders must not be "indefinite or ambiguous," and referred to two prior decisions [5] in which it had eliminated the word "temporary" from Commission orders relating to drug advertising upon the ground that this word "carries an uncertain meaning" (R. 979-980). The court further stated that it was "overwhelmingly established" that Imdrin affords relief for the pain and discomfort incident to many rheumatic and arthritic conditions, that the duration of such relief varied with the individual who used the drug, and that the five sections of the order which the court approved "will very largely correct the misleading and deceptive representations which petitioners have made in their advertisements" (R. 980).

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred:

1. In modifying paragraph 1(c) of the Commission's cease-and-desist order by rewriting it so as to change substantially the scope of its prohibitions, thereby permitting respondents to continue making representations which the Commission found to be false.

2. In holding that the word "temporary," as applied to the relief given by respondents' product, rendered paragraph 1(c) ambiguous or uncertain.

3. In failing to affirm and enforce paragraph 1(c).

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[5] *D.D.D. Corp.* v. *Federal Trade Commission*, 125 F. 2d 679, 682 (C.A. 7); *Carter Products, Inc.* v. *Federal Trade Commission*, 186 F. 2d 821, 826 (C.A. 7).

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REASONS FOR GRANTING THE WRIT

1. The Commission's order in this case was designed to prohibit serious misrepresentations in the public health field. The Court of Appeals, although sustaining the Commission's findings that respondents' representations were false, nevertheless rewrote the order in a way that had the effect of substantially narrowing the scope of the Commission's prohibitions, thereby permitting respondents to continue to make a number of these misleading claims. In so doing, we submit, the court exceeded its review powers under the Act.

As decisions of this Court make clear (*infra*, pp. 12-14), the reviewing court's power to modify a Commission order does not authorize the court to substitute its judgment for that of the agency as to the precise scope of relief necessary to protect the public from a recurrence of the violations shown. The question whether a reviewing court possesses the power which the court below purported to exercise is a recurring one in this field and important to all Federal administrative agencies.

The impact of the decision below on the public welfare is particularly serious in the instant case because the Commission's order dealt with an important matter of public health: the elimination of serious misrepresentations as to the therapeutic effectiveness of a drug which had been extensively advertised as a treatment for rheumatism and arthritis. The Court of Appeals modified the only paragraph of the Commission's order which deals with false representations as to relief from pain and discomfort. Under this modification, respond-

ents remain free to continue selling their product by making false claims as to its efficacy in relieving such symptoms. Misrepresentations that a drug will relieve severe arthritic and rheumatic pains, and ameliorate the stiffness and swelling which characteristically accompany the diseases—both of which the modified order permits (see *infra*, pp. 11-12),—obviously will have a strong sales appeal for the approximately seven million people in this country who suffer from the diseases.[6] And delay in obtaining necessary medical treatment of these conditions because of reliance on the claimed therapeutic properties of such a drug may, as the Commission found, result in irreparable crippling.

Finally, it should be noted that the Commission has instituted proceedings against five manufacturers of similar drugs, charging comparable misrepresentations in selling their products,[7] and that in one of them a stipulation has been filed that the

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[6] A 1938 study by the United States Public Health Service estimated that there were 6,850,000 cases of rheumatic diseases in the United States. *Primer on the Rheumatic Diseases*, 152 Journal of the American Medical Association, 323, 324. A recent Public Health survey indicated that in 1951 the number of sufferers probably was even greater. Woolsey, *Prevalence of Arthritis and Rheumatism in the United States*, 67 Public Health Reports, 505, 507-508.

[7] *Reliance Pharmacal Company*, Docket 5712 ("Artex"); *Norlon Corporation*, Docket 5741 ("Sural"); *Pruvo Pharmacal Company*, Docket 5778 ("Pruvo"); *Kordal Corporation*, Docket 6088 ("Kordolin"). In *Dolcin Corporation*, Docket 5692 ("Dolcin"), petition to review pending *sub nom. Dolcin Corporation* v. *Federal Trade Commission*, C.A. D.C., No. 11,700, the Commission issued a cease-and-desist order, one of whose provisions is substantially identical to paragraph 1(c) of the order in the instant case.

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final order is to be identical with the order in the instant case.[8]

2. The Court of Appeals modified the order because it deemed the adjective "temporary," when applied to the relief from pain and discomfort by Imdrin, to have an uncertain meaning. But the court did not restrict itself to eliminating the objectionable language—either by excision or appropriate rewriting—but instead substituted a different provision which substantially narrowed the scope of the Commission's prohibitions.

The Commission's order—which was based upon findings (accepted by the court) that Imdrin has *no* significant effect upon *severe* arthritic and rheumatic pains and discomforts, and gives only *temporary* and *partial* relief from *minor* pains and discomforts thereof—enjoined respondents from representing that the drug would relieve severe pains, or would have any therapeutic effect other than to give temporary and partial relief of minor aches, pains, and fever. As modified by the Court of Appeals, however, the order merely prohibits respondents from representing that Imdrin will *permanently* relieve pain, or that it will *cure* arthritic or rheumatic symptoms or manifestations. Respondents thus may continue to represent (1) that Imdrin will temporarily relieve severe pains and discomforts, and (2) that it will stop or relieve swelling or stiff joints, despite the court's acceptance of the Commission's findings that such representa-

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[8] *Pruvo Pharmacal Company, supra,* note 7.

tions are false. Indeed, respondents may make any misrepresentations respecting the extent of the relief given by Imdrin, as long as they stop short of alleging that it is permanent. They may call it "extended," "substantial," or any other misleading adjective they select. The court's modification of the order is thus inconsistent with its own acceptance of the Commission's findings.

Section 5(c) of the Federal Trade Commission Act authorizes the courts of appeals to modify, as well as to affirm or reverse, orders of the Commission, and the power to modify extends to the remedy. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 611. But "[t]he Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" disclosed by the record, and "judicial review is limited * * * to ascertain[ing] whether the Commission made an allowable judgment in its choice of the remedy * * *. [The Commission] has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Ibid.*, 612-613; *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 473.

The reviewing court has no power to rewrite the Commission's order to reflect its own view as to what an appropriate remedy would be. Cf. *American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U. S. 90, 118. But the court below, in modifying paragraph 1(c), did precisely that. The decision thus conflicts with the principle established in applicable decisions of this Court

that the reviewing court's function is limited to ascertaining "whether the Commission made an allowable judgment in its choice of the remedy * * *."

That the court was substituting its judgment for that of the agency as to remedy is further shown by the court's statement that the five subparagraphs of the order which it approved and enforced "will very largely correct the misleading and deceptive representations which petitioners have made in their advertisements" (R. 980). This statement would seem to indicate that, in the court's view, the prohibitions in paragraph 1(c) are of little significance. The five other subparagraphs, however, do not prohibit the misrepresentations as to relief from pain, stiffness and swelling, which paragraph 1(c) was designed to prevent (see *supra*, p. 7, fn. 4), and the latter misrepresentations are particularly serious. "* * * courts should be reluctant to emasculate a remedial order by striking out its more dynamic and practically effective parts while they affirm the Commission's proceedings as a whole." *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission*, 143 F. 2d 676, 680 (C. A. 2).

Paragraph 1(c), as drawn by the Commission, was designed to protect the public from misrepresentations as to relief from pain and discomfort shown by the record, and clearly was justified by the Commission's findings. Cf. *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426. It represented a sound exercise of the

Commission's broad discretion to fashion a remedy appropriate "to cope with the unlawful practices." *Siegel* case, *supra;* cf. *National Labor Relations Board* v. *Gullett Gin Co.,* 340 U. S. 361, 362-363. Even assuming *arguendo* that some modification of the order was proper—a point which we dispute (see *infra,* pp. 14-15)—the court was not authorized to "exercise an essentially administrative function" by revising the remedy selected by the Commission to conform to its own views as to the measure of protection which the public interest requires. *Federal Power Commission* v. *Idaho Power Co.,* 344 U. S. 17, 21.[9] The reviewing court "may not disturb the measure of relief which the administrative tribunal thinks necessary." *Deer* v. *Federal Trade Commission,* 152 F. 2d 65, 67 (C. A. 2).

3. Thus far, we have assumed *arguendo* that the court below correctly held that the adjective "temporary" is ambiguous or uncertain. We submit, however, that this word did not render the Commission's order vague or indefinite, and that the Court of Appeals erred in holding that modification of the order was necessary.

The Commission found, and the court sustained the finding, that at most Imdrin gives only temporary relief from the pain and discomfort of mild rheumatic and arthritic conditions. While a number of expert medical witnesses testified that Imdrin would give "temporary" relief (e.g., R. 284,

[9] If the contemplated modification would result in a substantial change in the Commission's prohibitions, the court should remand the matter to the agency for reconsideration. *Federal Power Commission* v. *Idaho Power Co.,* 344 U.S. 17, 20-21; *Federal Trade Commission* v. *Morton Salt Co.,* 334 U.S. 37, 55.

309-320, 438-439), the only one who defined the term stated that he used it to mean from "a few minutes" to "at the longest an hour" (R. 283). Thus, the Commission could have prohibited respondents from advertising that Imdrin would give relief for more than an hour. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470. Instead, however, the Commission left respondents free to formulate their own language to reflect the limited relief which their product gives.[10] This was well within the Commission's "wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices." *Siegel* case, *supra*. "The order is not bound to chart a course for the petitioner. The petitioner can have no doubt of the evils complained of and sought to be corrected." *Zenith Radio Corp.* v. *Federal Trade Commission*, 143 F. 2d 29, 31 (C. A. 7). The specificity required of an order depends upon the particular evils at which it is directed, and the word "temporary" is appropriate to describe the only relief which Imdrin was found to provide.[11]

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[10] They may, of course, use the word "temporary," although the Commission's order does not require them to do so.

[11] In holding that the word "temporary" is uncertain, the Court of Appeals relied on two prior cases in which it had eliminated the word from Commission orders relating to the relief given by certain medicinal preparations. *D.D.D. Corp.* v. *Federal Trade Commission*, 125 F. 2d 679, 682; *Carter Products, Inc.* v. *Federal Trade Commission*, 186 F. 2d 821, 826. In the *Carter* case, however, the expert testimony was that the effectiveness of a deodorant might vary from 3 to 24 hours. In an intervening case, *Sebrone Co.* v. *Federal Trade Commission*, 135 F. 2d 676, 679, the same court sustained a Commission order prohibiting representations that products would provide more than temporary relief from dandruff or body odor.

CONCLUSION

The decision below is in conflict with principles established in applicable decisions of this Court and other courts of appeals, and involves important questions of Federal law. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MAY, 1954.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 [illegible]